No. 6077

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THOMAS DAY COMPANY, a corporation, and WHITMAN SYMMES,

Appellants,

vs.

CLAUDE R. KING, Receiver of Thomas Day Company, ROBERTS MANUFACTURING COMPANY, a corporation, and GILL VIRDEN COMPANY, a corporation,

Appellees.

APPELLANTS' BRIEF.

FILED
MAY 13 1930
PAUL P. O'BRIEN,
CLERK

THOMAS, BEEDY, PRESLEY & PARAMORE,
315 Montgomery Street, San Francisco,
Attorneys for Thomas Day Company.

STERLING CARR,
310 Sansome Street, San Francisco.
Attorney for Whitman Symmes.

Parker Printing Company, 523 Clay Street, San Francisco

Index.

Page

Foreword 1

Statement of the Case 2

Assignments of Error 4

Brief of Argument 6

I. The management and operation of the property by the receiver must be in accordance with the requirements of the valid laws of the State of California 7

II. In ordering sales by receivers appointed by the District Court, the state laws governing the same will be followed by such court 8

III. The appointment of a receiver for a corporation does not suspend the corporate functions 9

IV. Likewise, the appointment of the present receiver did not dissolve Thomas Day Company, and, therefore, neither the receiver nor the court had any jurisdiction or authority over the name or franchise of such company 11

V. The receiver had no authority to make, and the court had no jurisdiction to confirm, a sale of any property of Thomas Day Company which could not be reached on an execution sale under the laws of the State of California 15

VI. The right to be a corporation is a franchise and to acquire such franchise under the general law the required statutory conditions must be complied with 16

VII. The franchise to be a corporation cannot be sold under execution under the laws of the State of California 16

Page

VIII. The name of a corporation is a part of its franchise and therefore cannot be sold under execution or at a receiver's sale 17

IX. The sale of the good-will of Thomas Day Company did not carry the right to the name of such corporation........ 21

X. The District Court erred in allowing the receiver to sell to the purchaser the right "to hold itself out as the successor of Thomas Day Company", for such an order permitted the receiver to do indirectly that which he could not do directly, namely, in effect sell the name of the company 22

Conclusion 27

Table of Cases Cited

	Pages
14A *Corpus Juris*, page 977, Sec. 3217	9
American Mine Equipment Company v. Illinois Coal Corporation, 31 Fed. 2nd 507 (C. C. A. 7th Circuit)	8
American Steel Foundries v. Robertson, 269 U. S. 372 (46 Sup. Ct. Rep. 160)	20
Armington v. Palmer, 42 Atl. (R. I.) 308	24
Cal. Jur., Vol. 6, page 623	16
Calif. Civil Code, Sec. 992	21
California Jurisprudence, Vol. 6, page 623	17
California Jurisprudence, Vol. 6, pages 627, 628	18
C. C. P., Sec. 1276, et seq	19
Chemical National Bank of Chicago v. Hartford Deposit Company, 161 U. S. 1	9
Civil Code, Sec. 388	16
Civil Code, Section 290	18
Civil Code, Section 362	19
Civil Code, Sec. 993	22
Clark on Receivers, Vol. 1, page 239	11
Clark on Receivers, Vol. 1, page 240	11
"*Clark, the Law of Receivers*" (1918), Vol. 1, page 676, Sec. 587	17
Code of Civil Procedure, commencing with Section 1227	13
Davis v. Gray, 16 Wall. 203, 21 L. Ed. 452	15
Erb v. Morasch, 177 U. S. 584	7
Feess v. Mechanics' State Bank, 84 Kansas 828, 115 Pac. Rep. 563	12
Foster's Federal Practice, Vol. 2, page 1535	15
Gregory v. Blanchard, 98 Cal. 313	16
Judicial Code, Section 65, March 3, 1911, Chapter 231, Section 65, 36 Stat. 1104, U. S. C. A. 28, Section 124	7
Julian v. Central Trust Co., 193 U. S. at page 106	20
Lyon v. Carpenters' Hall Assn., 66 Cal. App. at page 552	14

Pages

Malko Milling & Lighting Co., In re, 32 Fed. (2d) 825 24
Memphis and Little Rock Railroad Company v. Berry, 112 U. S. 609 19
Mercantile Trust Co. v. Tennessee Central R. R. Co., 286 Fed. 425 7
Murray v. Superior Court, 129 Cal. 628 12

People v. Selfridge, 52 Cal. page 331 16
Pierrepont v. Fidelity-Philadelphia Trust Co., 32 Fed. (2d) 608 8

Standard Roller Bearing Co. v. Hess-Bright Mfg. Co., 275 Fed. 916 (C. C. A. Third) 10, 11
Stokes v. Williams, 226 Fed. 148; C. C. A. 3d Circuit, Subdivision 4 8

Theobald-Jansen Electric Co. v. Wood, 285 Fed. 29 (C. C. A. Sixth) 24

Union Savings & Investment Co. v. District Court, 44 Utah 397, 140 Pac. Rep. 221 12

No. 6077

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THOMAS DAY COMPANY, a corporation, and WHITMAN SYMMES, *Appellants,* vs. CLAUDE R. KING, Receiver of Thomas Day Company, ROBERTS MANUFACTURING COMPANY, a corporation, and GILL VIRDEN COMPANY, a corporation, *Appellees.*	}

APPELLANTS' BRIEF.

FOREWORD.

This appeal is taken from an order confirming a sale of the assets of the Thomas Day Company made by the United States District Court for the Northern District of California, Southern Division, in an equity action brought in that court entitled "Gill Virden Company, a corporation, complainant v. Thomas Day Company, a corporation, defendant". This order provided that the purchaser, the Roberts Manufacturing Company, was entitled to the good-will of the business

of Thomas Day Company, *and the right of the said Roberts Manufacturing Company to hold itself out as the successor of the Thomas Day Company* and as having acquired the good-will thereof. Appellants contend that the District Court had no jurisdiction to include in such order of sale the right of said Roberts Manufacturing Company *to hold itself out as the successor of the Thomas Day Company.*

STATEMENT OF THE CASE.

The complainant in the action of *Gill Virden Company v. Thomas Day Company* is a Pennsylvania corporation organized for the purpose of doing a general manufacturing business and for the sale of articles necessary for the manufacture of lighting fixtures. The defendant, Thomas Day Company, is a California corporation organized for the purpose of manufacturing and selling lighting fixtures and equipment.

On the 3rd day of December, 1928 the Gill Virden Company filed its bill in equity on its behalf and on behalf of all other creditors of the Thomas Day Company against the said Thomas Day Company for the appointment of a receiver to take possession of its property, business and assets (Trans. pp. 2-9). On the same day the said Thomas Day Company filed its answer admitting the allegations of said bill in equity as true and joined in the prayer of said bill for the appointment of a receiver (Trans. pp. 9-11). Pursuant to said bill and answer the District Court on the

3rd day of December, 1928, upon the motion of the attorney for said Gill Virden Company, made its order appointing one Charles F. Duval as the receiver of said Thomas Day Company, and of all of its property and assets (Trans. pp. 11-13). That the said Charles F. Duval pursuant to said order took possession of said business, property and assets of said Thomas Day Company. The said Charles F. Duval continued as receiver until the 10th day of September, 1929 when he was killed in an automobile accident. Thereupon and on the 20th day of September, 1929, one Charles F. King was appointed the temporary receiver of the said Thomas Day Company (Trans. pp. 14-22). That he now is the duly qualified and acting temporary receiver of the said Thomas Day Company and of all of its property and assets.

On the 23rd day of September, 1929, Claude R. King, the temporary receiver, filed his "petition for confirmation of sale, or for the adoption of a reorganization plan" (Trans. pp. 23-29). This petition was not acted upon for the reason that the District Court held that it did not have the right or jurisdiction to sell the name "Thomas Day Company". Subsequently and on the 31st day of October the temporary receiver published a "notice of sale of assets at court sale", to be held on the 12th day of November, 1929 in open court at 10 A. M. This notice of sale offered the business and the good-will of the business of Thomas Day Company and *the right of the purchaser to hold itself out as the successor of the Thomas Day Company* and as having acquired the

good-will thereof (Trans. pp. 30-34). On the 17th day of November, 1929, the Roberts Manufacturing Company in open court bought the business, assets and good-will of the said Thomas Day Company, *with the right to hold itself out as the successor of said Thomas Day Company* and as having acquired the good-will thereof, said sale, however, being subject to confirmation by the court on the 25th day of November, 1929.

Thereupon, on the 18th day of November, 1929, Whitman Symmes, Mabel Symmes, Anson Blake and Anita Blake, filed their opposition to the petition of the receiver to sell the right of the purchaser to hold itself out as the successor of Thomas Day Company (Trans. pp. 34-37). Subsequently, and on the 25th day of November, 1929, and at the time of such hearing, the said Thomas Day Company filed its opposition to the petition of said receiver to sell the good-will of the Thomas Day Company and the *right of the purchaser to hold itself out as the successor of Thomas Day Company* (Trans. pp. 37-39).

On November 25, 1929, the petition for confirmation of the sale came on for hearing and the objections to the sale were overruled, to which the opposing parties took an exception which was allowed by the court. Thereupon it was ordered the sale be confirmed (Trans. pp. 43-47).

ASSIGNMENTS OF ERROR.

The errors asserted and relied upon by appellants are as follows (Trans. pp. 52-56):

The court erred:

1. In the making and entering of its order confirming sale of the assets of the above defendant corporation dated November 25, 1929, in that:

(a) The receiver of said corporation had no authority to sell the assets of said corporation under the notice of sale dated October 31, 1929, appearing in Trans. pp. 53-54.

(b) The receiver of said corporation had no authority to set forth in said notice of sale that he would sell the good-will of the business of the Thomas Day Company and/or the right of the purchaser to hold itself out as successor of the Thomas Day Company and as having acquired the good-will thereof;

(c) The receiver of said corporation had no authority to make a sale of the right of the purchaser of the assets of said corporation to hold itself out as the successor of the Thomas Day Company, defendant herein, all as set forth in the said notice of sale of assets;

(d) The receiver had no jurisdiction over the good-will and/or the name "Thomas Day Company";

(e) The receiver had no jurisdiction or right to give, sell or grant to said purchaser the right to hold itself out as the successor of Thomas Day Company.

2. That the above-entitled court was without jurisdiction:

(a) To make and enter an order confirming the sale by the receiver of said defendant corporation of the good-will and/or the name "Thomas Day Company";

(b) To make any order confirming the sale of the good-will and/or the name "Thomas Day Company";

(c) To make an order granting said purchaser the right to hold itself out as the successor of Thomas Day Company.

BRIEF OF ARGUMENT.

At the outset it is admitted that the receiver had the authority to make, and the court the power to confirm, a sale of the business and physical assets and also the good-will of the business of Thomas Day Company;

But it is contended that the receiver had no authority to make, or the court to approve, a sale of the right of the purchaser to hold itself out as the successor of Thomas Day Company. This for the reason that the receiver could not make a sale of the name of the corporation Thomas Day Company or of its franchise to be a corporation, and therefore could not authorize the purchaser to hold itself out as the successor of Thomas Day Company, for to permit such a sale would be to allow the receiver to do that indirectly which he could not do directly.

Note, please, that the order did not state that the purchaser might hold itself out as the successor of the business and good-will of Thomas Day Company, but as the successor of Thomas Day Company, thus clearly implying to the public that it had acquired the right to the name Thomas Day Company and to its corporate functions.

I.

THE MANAGEMENT AND OPERATION OF THE PROPERTY BY THE RECEIVER MUST BE IN ACCORDANCE WITH THE REQUIREMENTS OF THE VALID LAWS OF THE STATE OF CALIFORNIA.

Judicial Code, Section 65, March 3, 1911, Chapter 231, Section 65, 36 Stat. 1104, U. S. C. A. 28, Section 124.

> "Management of property by receivers. Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the state in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall willfully violate any provision of this section shall be fined not more than $3,000., or imprisoned not more than one year, or both."

In *Mercantile Trust Co. v. Tennessee Central R. R. Co.,* 286 Fed. 425, it was held that a state statute governs the operations of a railroad by a receiver appointed by the federal court.

Likewise, in *Erb v. Morasch,* 177 U. S. 584, it was held that a federal receiver must operate a railroad in accordance with the ordinance of a city regulating the speed of the trains through such a city.

II.

IN ORDERING SALES BY RECEIVERS APPOINTED BY THE DISTRICT COURT, THE STATE LAWS GOVERNING THE SAME WILL BE FOLLOWED BY SUCH COURT.

Stokes v. Williams, 226 Fed. 148; C. C. A. 3d Circuit, Subdivision 4.

In the *Stokes* case the court held:

> "It is not error for the District Court to decree a private sale of a corporation's assets and rights, upon terms proposed to its receivers by the creditors of the corporation, without requiring public notice thereof by advertisement or otherwise, notice of the offer with opportunity to object having been given each creditor and stockholder, in view of P. L. N. J. 1896, p. 298, empowering receivers to transfer the assets, rights, and interests of the corporations for which they act, and in view of the power of the state courts to determine and control the terms of such sales and to sell either at public or private sale."

In the case of *American Mine Equipment Company v. Illinois Coal Corporation,* 31 Fed. 2nd 507 (C. C. A. 7th Circuit) it was held:

> "Statutes providing for redemption from judicial sales constitute a rule of property in their respective states, and are binding upon courts of chancery as well as law, and will be given effect in the federal courts. Brine v. Insurance Co., 96 U. S. 627, 24 L. Ed. 858."

In

Pierrepont v. Fidelity-Philadelphia Trust Co., 32 Fed. (2d) 608,

it was held:

"Susbtantial rights resting on state statutes or decisions, especially when they constitute rules of property, are as obligatory on federal courts in equity as on the state courts."

III.

THE APPOINTMENT OF A RECEIVER FOR A CORPORATION DOES NOT SUSPEND THE CORPORATE FUNCTIONS.

The rule is laid down in

14A *Corpus Juris,* page 977, Sec. 3217:

"The mere appointment of a receiver for a corporation will not work its dissolution. This is so, although the property of the corporation is sold, and the corporation deprived of its books and records on sale of its assets, and although the decree appointing the receiver also enjoins the corporation from the exercise of its powers and franchises. Notwithstanding the appointment of a receiver, the corporate existence continues, and its corporate identity is preserved, until its dissolution is effected in some one of the manners subsequently described; and the corporation may exercise its corporate powers and franchises, except as to the matters especially confided to the receiver by the court, or where the exercise of such franchises would interfere with the rightful management of its affairs by the receiver so far as his duties are defined by the court appointing him. * * *"

Probably the leading case on this question is

Chemical National Bank of Chicago v. Hartford Deposit Company, 161 U. S. 1,

where it was held that:

"The appointment of a receiver for a national bank does not, in itself, put an end to the cor-

porate existence of the bank so as to prevent the rendition of a judgment against it."

In

Standard Roller Bearing Co. v. Hess-Bright Mfg. Co., 275 Fed. 916 (C. C. A. Third),

on page 920, the Court said:

"We are not persuaded that the corporation suffered an entire suspension of its functions and authority over its property by the appointment of receivers. True, acts done in violation of a receivership injunction may be void, but courts are inclined to hold them void only at the election of the injured party. Murray v. Lylburn, 2 Johns. Ch. (N. Y.) 441; Union Trust Co. v. Southern Navigation Co., 130 U. S. 565, 570, 571, 9 Sup. Ct. 606, 32 L. Ed. 1043. Nor have we in mind a case where an act done in violation of such an injunction has been undone by a court upon the application of the wrongdoer. Greenwald v. Roberts, 4 Heisk. (Tenn.) 494. There is a broad distinction between acts of a corporation in receivership which are violative of an injunction, in hindrance of the administration of the estate, or in depletion of its assets, and conduct which depends for its validity on the life of the corporation. The appointment of a receiver does not dissolve the corporation or suspend its existence. Chemical National Bank v. Hartford Deposit Co., 161 U. S. 1, 16 Sup. Ct. 439, 40 L. Ed. 595; Du Pont v. Standard Arms Co., 9 Del. Ch. 315, 320, 81 Atl. 1089. It still is the same corporate entity that it was before. It is clothed with the same franchises and its corporate powers continue to exist, subject in their exercise, of course, to limitations arising out of the changed situation. O. & M. Ry.

Co. v. Russell, 115 Ill. 52, 57, 3 N. E. 561; Linn v. Dixon Crucible Co., 59 N. J. Law, 28, 30, 35 Atl. 2; Rosenbaum v. U. S. Credit System Co., 61 N. J. Law, 543, 40 Atl. 591."

IV.

LIKEWISE, THE APPOINTMENT OF THE PRESENT RECEIVER DID NOT DISSOLVE THOMAS DAY COMPANY AND, THEREFORE, NEITHER THE RECEIVER NOR THE COURT HAD ANY JURISDICTION OR AUTHORITY OVER THE NAME OR FRANCHISE OF SUCH COMPANY.

Standard Roller Bearing Co. v. Hess-Bright Mfg. Co., supra.

"A Court of Equity in the absence of statute has no right to wind up, dissolve or annihilate a corporation or deprive it of its rights to live given by the Legislature."

Clark on Receivers, Vol. 1, page 240.

"A corporation is a distinct entity, its affairs are necessarily managed by officers and agents, it is true, but in law it is as distinct a being as an individual as an individual is, and is entitled to hold property if not contrary to its charter, as absolutely as an individual can hold it. Its estate is the same, its interest is the same, its possession is the same."

Clark on Receivers, supra.

"A Court of Equity has not the power to wind up or dissolve or annihilate an individual nor to take away his civil rights."

Clark on Receivers, Vol. 1, page 239.

"In the absence of express statutory authority the court has no authority at the suit of an individual or a minority stockholder to dissolve a corporation, wind up its affairs, and distribute its assets."

Feess v. Mechanics' State Bank, 84 Kansas 828, 115 Pac. Rep. 563.

"The power to wind up the affairs of a corporation and to dissolve it, is not one which inheres in the courts, but exists only when confirmed by statute."

Union Savings & Investment Co. v. District Court, 44 Utah 397, 140 Pac. Rep. 221.

In

Murray v. Superior Court, 129 Cal. 628,

at the bottom of page 631, the Court said:

"It will be observed that the above section provides for the appointment of a receiver only 'upon dissolution of the corporation.' The corporation not having been dissolved it is evident that the section does not authorize the appointment of the receiver. It is said by Beach in his work on Receivers, section 86: 'The courts have not the power to appoint receivers to wind up the affairs of a corporation in the absence of statutory provisions.'"

On page 632, the Court further said:

"This court passed upon the particular subdivision of said section in La Societe Francaise D'Epargnes etc. v. District Court, 53 Cal. 495, 553, and in the opinion said: 'The particular subdivision, however, which is supposed to confer the power in question and to authorize the district court to appoint a receiver of the property

of this corporation, is the fifth—being the only portion of the statute in which corporations are named: "A receiver may be appointed * * * in the cases when a corporation * * * is insolvent."

'There is, of course, no such thing as an action brought distinctively for the mere appointment of a receiver; such an appointment, when made, is ancillary to or in aid of the action brought. Its purpose is to preserve the property pending the litigation, so that the relief awarded by the judgment, if any, may be effective. The authority conferred upon the court to make the appointment necessarily presupposes that an action is pending before it, instituted by some one authorized by law to commence it. But there is no statute in this state, none to which we have been pointed, which undertakes to confer upon a private person, either as stockholder or creditor, the right to maintain an action to dissolve a corporation upon the ground that it is insolvent, or to obtain relief by seizing its property out of the hands of its constituted management, and placing it in the hands of a receiver.' This construction of the subdivision was followed and approved by this court in bank in the late case of Fischer v. Superior Court, 110 Cal. 141. (See Neall v. Hill, 16 Cal. 150; Fischer v. Superior Court, supra; Havemeyer v. Superior Court, 84 Cal. 364; People's Home Sav. Bank v. Superior Court, 103 Cal. 27; Harrison v. Hebbard, 101 Cal. 152.)"

A California corporation may only be dissolved in one of two ways, first by an action of the state itself through its proper officers, or by a voluntary dissolution as provided in the *Code of Civil Procedure,* commencing with Section 1227.

In

Lyon v. Carpenters' Hall Assn., 66 Cal. App. at page 552

(re-hearing denied by Supreme Court) the rule is set forth as follows:

> "If Carpenters' Hall Association (a corporation) had suffered no forfeiture, or if it had not been dissolved, the courts would have no right through a receiver to take possession of the corporation's property, to sell the property, or to distribute the proceeds among the persons entitled thereto, because the law has placed all of those powers in the hands of the directors of the corporation. (Civ. Code, sec. 305.)
>
> "No statute is cited, and we know of no statute, which declares that the foregoing set of facts constitute a forfeiture. Of course, if there were a statute to that effect the statute would be recognized and administered by the court according to its terms. (Los Angeles Ry. v. Los Angeles, 152 Cal. 242 [125 Am. St. Rep. 54, 15 L. R. A. (N. S.) 1269, 92 Pac. 490]; Kaiser Land and Fruit Co. v. Curry, 155 Cal. 638 [103 Pac. 341].) In the absence of a statute to the contrary, it is the settled law of California that the state only is entitled to maintain an action to have it adjudged that a forfeiture has occurred and to enforce such forfeiture. In People v. Los Angeles Elec. Ry. Co., 91 Cal. 338, 340 [27 Pac. 673, 674], the court says: 'Acts sufficient to cause a forfeiture do not per se produce a forfeiture. The corporation continues to exist until the sovereignty which created it shall, by proper proceedings in a proper court, procure an adjudication of forfeiture and enforce it.' And see 26 C. J. 1045, sec. 117 and sec. 119.) Indeed, the rule is statutory. (Code Civ. Proc., sec. 803)."

V.

THE RECEIVER HAD NO AUTHORITY TO MAKE, AND THE COURT HAD NO JURISDICTION TO CONFIRM, A SALE OF ANY PROPERTY OF THOMAS DAY COMPANY WHICH COULD NOT BE REACHED ON AN EXECUTION SALE UNDER THE LAWS OF THE STATE OF CALIFORNIA.

This for the following reasons:

(a) A receiver's sale is in the nature of an execution sale in that property is taken from the debtor and sold without his consent;

(b) If property is not subject to execution it cannot be taken forcibly from the debtor.

> *Foster's Federal Practice,* Vol. 2, page 1535.
>
> "A receiver may be appointed to preserve and take possession of every kind of property, whether the same be what is termed corporeal or incorporeal, *which can be seized by execution at law or which constitutes equitable assets.*"

In

> *Davis v. Gray,* 16 Wall. 203, 21 L. Ed. 452,

the court said:

> "A receiver is appointed upon a principle of justice for the benefit of all concerned. Every kind of property of such a nature that, if legal, *it might be taken in execution,* may, if equitable, be put into his possession. Hence the appointment has been said to be an equitable execution."

VI.

THE RIGHT TO BE A CORPORATION IS A FRANCHISE AND TO ACQUIRE SUCH FRANCHISE UNDER THE GENERAL LAW THE REQUIRED STATUTORY CONDITIONS MUST BE COMPLIED WITH.

People v. Selfridge, 52 Cal. page 331.

This is the leading case in California on this subject and has been followed continuously.

Also see

Cal. Jur., Vol. 6, page 623.

VII.

THE FRANCHISE TO BE A CORPORATION CANNOT BE SOLD UNDER EXECUTION UNDER THE LAWS OF THE STATE OF CALIFORNIA.

Civil Code, Sec. 388,

provides:

> "For the satisfaction of any judgment against any person, company or corporation having any franchise *other than the franchise of being a corporation,* such franchise, and all rights and privileges thereof, may be levied upon and sold under execution, in the same manner, and with the same effect, as any other property."

In

Gregory v. Blanchard, 98 Cal. 313,

it is said:

> "In the absence of a statutory provision therefor, a franchise cannot be levied on or sold under

execution. (Freeman on Executions, sec. 179; Stewart v. Jones, 40 Mo. 140; Gue v. Canal Co., 24 How. 263.) Whenever such a provision exists, the extent as well as the mode of such levy and sale are limited thereby."

In

"*Clark, the Law of Receivers*" (1918), Vol. 1, page 676, Sec. 587

it is said:

"Most states by statute provide for a sale of franchises by a receiver of a railroad and for the purchaser to operate the property under those franchises. Unless there is such a statute it is difficult to see how a receiver can sell franchises which were given to the company unless the grant by the legislature contemplated such a sale."

VIII.

THE NAME OF A CORPORATION IS A PART OF ITS FRANCHISE AND THEREFORE CANNOT BE SOLD UNDER EXECUTION OR AT A RECEIVER'S SALE.

In

California Jurisprudence, Vol. 6, page 623,

it is stated:

"The right to be a corporation is in itself a franchise, and to acquire a franchise under a general law, the prescribed statutory conditions must be complied with. Certain things are made conditions precedent in such statutory process. Thus, it is a general rule that where the statute requires articles of incorporation to be filed before the proposed corporation is authorized to engage

> in the business for which it has been created, the filing of the articles in the manner prescribed constitutes a condition precedent to the right to perform corporate functions. Likewise, the omission of statements required to be contained in the articles of incorporation or other necessary prerequisites will prevent the formation of a de jure corporation."

and authorities cited.

Civil Code, Section 290,

provides:

> "That articles of incorporation shall state (1) the name of the corporation, etc."

In

California Jurisprudence, Vol. 6, pages 627, 628,

it is stated:

> "The name of the corporation must be set forth in the articles; and this name must not, of course, bear such a close resemblance to the name of another corporation as will tend to deceive. The secretary of state is forbidden to file the copy of the copy of articles or to issue the certificate of incorporation where a violation of this provision occurs. The statutes also forbid the use of certain words as a part of the corporate name of ordinary corporations, as, for instance, the words 'trust' or 'trustee'; and words indicating a banking business cannot be used unless the corporation is properly organized and authorized to do such business,"

and authorities cited.

A California corporation cannot change its name without an amendment of its articles and the com-

mencement of an action for such purpose and the securing of a decree therefor.

Civil Code, Section 362;
C. C. P., Sec. 1276, et seq.

The charter of a corporation is a contract which cannot be changed without the consent of both the state and the corporation. True, in California by reservations in the Constitution and the Codes, the state retains the power to amend the charter, but such reservation does not change the general principle or the fact that such a charter is a contract.

In

Memphis and Little Rock Railroad Company v. Berry, 112 U. S. 609,

the question arose as to whether or not a corporation purchasing at a mortgage sale all of the franchises and property of a corporation also *ipso facto,* under a statute of Arkansas having reference thereto, acquired the franchise of being a corporation possessed by the mortgagor, to such an extent as to acquire the exemption from taxation wherever extended by such statute to the mortgagor. The court held that it did not, and in the course of its discussion stated:

> "But, as was said by this court in Central R. R. and Banking Co. v. Georgia, 92 U. S. 665-670 [XXIII., 757-760], 'It is an unbending rule that a grant of corporate existence is never implied. In the construction of a statute every presumption is against it.'
>
> "The application of this rule is not avoided by the claim that the present is not the case of an original creation of a corporate body, but the

transfer, by assignment, of a previously existing charter and of the right to exist as a corporation under it. The difference is one of words, merely. The franchise of becoming and being a corporation, in its nature, is incommunicable by the act of the parties and incapable of passing by assignment. 'The franchise to be a corporation,' said Hoar, J., in Commonw. v. Smith, 10 Allen 448-455, 'clearly cannot be transferred by any corporate body of its own will. Such a franchise is not, in its own nature, transmissible.' In Hall v. Sullivan R. R. Co., 21 Law Rep., 138, 2 Redf. Rail. Cas., 621; 1 Brunner, Collected Cases, 613, Mr. Justice Curtis said: 'The franchise to be a corporation is, therefore, not a subject of sale and transfer, unless the law, by some positive provision, has made it so, and pointed out the modes in which such sale and transfer may be effected.' No such positive provision is contained in the Act under consideration, and no mode for effecting the organization of a series of corporations under it is pointed out, either in the Act itself or in any other statute prior to that of December 9, 1874."

The quotation from the *Memphis* case was referred to and approved in

Julian v. Central Trust Co., 193 U. S. at page 106.

The extent to which the Federal Courts will go in the protection of the name adopted by a corporation is well stated in

American Steel Foundries v. Robertson, 269 U. S. 372 (46 Sup. Ct. Rep. 160),

at page 380, where it is said:

"The effect of assuming a corporate name by a corporation under the law of its creation is to

exclusively appropriate that name. It is an element of the corporation's existence. Newby v. Oregon Cent. Ry. Co. et al., Deady, 609, 616, 18 Fed. Cas. 38, No. 10,144. And, as Judge Deady said in that case:

'Any act which produces confusion or uncertainty concerning this name is well calculated to injuriously affect the identity and business of a corporation. And as a matter of fact, in some degree, at least, the natural and necessary consequence of the wrongful appropriation of a corporate name, is to injure the business and rights of the corporation by destroying or confusing its identity.'

"The general doctrine is that equity not only will enjoin the appropriation and use of a trade-mark or trade-name, where it is completely identical with the name of the corporation, but will enjoin such appropriation and use where the resemblance is so close as to be likely to produce confusion as to such identity, to the injury of the corporation to which the name belongs."

Therefore, the name Thomas Day Company, being part of the franchise of such corporation, was not subject to sale by the receiver.

IX.

THE SALE OF THE GOOD-WILL OF THOMAS DAY COMPANY DID NOT CARRY THE RIGHT TO THE NAME OF SUCH CORPORATION.

Calif. Civil Code, Sec. 992, provides:

"The good-will of a business is the expectation of continued public patronage, but it does not

include a right to use the name of any person from whom it was acquired."

Civil Code, Sec. 993,

also provides:

"The good-will of a business is property, transferable like any other, and the person transferring it may transfer with it the right of using the name under which the business is conducted."

The District Court refused to allow the receiver to sell the name "Thomas Day Company", and the corporation did not make such a sale so that all that actually passed under the sale was the good-will and the business of Thomas Day Company. The franchise, the corporate existence and the name "Thomas Day Company" all remain with such company. There is nothing legally to prevent such company from carrying on any business (other than for the present the lighting business) it might desire to operate.

X.

THE DISTRICT COURT ERRED IN ALLOWING THE RECEIVER TO SELL TO THE PURCHASER THE RIGHT "TO HOLD ITSELF OUT AS THE SUCCESSOR OF THOMAS DAY COMPANY", FOR SUCH AN ORDER PERMITTED THE RECEIVER TO DO INDIRECTLY THAT WHICH HE COULD NOT DO DIRECTLY, NAMELY, IN EFFECT SELL THE NAME OF THE COMPANY.

It will be noted that the order did not provide that the purchaser might hold itself out as *the successor of the business and good-will of Thomas Day Com-*

pany; such a sale and order in all probability would have been valid for the purchaser actually purchased all of the physical property of the company and also the good-will thereof so that the designation of such purchaser as the *successor of the business and good-will of Thomas Day Company might be correct,* but the designation *"successor of Thomas Day Company"* is not correct in that it does not state the truth, for as long as Thomas Day Company, as a corporate entity using that name and conducting its corporate business thereunder, remains in existence, it, the corporate entity of Thomas Day Company, and the name "Thomas Day Company", has no successor. As shown above, the District Court could not by its order dissolve such company nor could it take from it its corporate functions or name. The order as made only tends to confusion and opens the door to deception. The fact that an old, well established and honorable concern, such as Thomas Day Company has fallen upon unhappy days financially to the extent that its creditors have placed its business and assets in the hands of a receiver does not demolish its corporate entity and existence, even after its property and physical assets have been sold to satisfy such creditors, any more than does an individual who has been discharged in bankruptcy lose his identity or name. The same rule applicable to an individual in such bankruptcy situation has also been applied to corporations.

In

Theobald-Jansen Electric Co. v. Wood, 285 Fed. 29 (C. C. A. Sixth),

it was held:

"An adjudication against a bankrupt corporation does not terminate its corporate existence, in view of Bankruptcy Act, Sec. 4 (Comp. St., Sec. 9588), giving the corporation a right to apply for a discharge from its existing liability, and section 14 (Comp. St., Sec. 9598), giving all bankrupts the right to be discharged on proper showing, and the corporation is thereafter free to do business under its corporate name."

Also

In re Malko Milling & Lighting Co., 32 Fed. (2d) 825,

it was held:

"State held entitled to allowance of claim against bankrupt corporation for franchise tax imposed under Code Pub. Gen. Laws Md. 1924, art. 23, Sec. 109, though tax did not accrue until after state receivership, since receivership does not in law terminate the corporate existence, and the tax is made on the right to be a corporation, not on the actual exercise of it, regardless of what may be the reason for non-exercise."

A situation similar to that at bar arose in the case of

Armington v. Palmer, 42 Atl. (R. I.) 308,

where it was held that:

"Purchase of the manufacturing plant, machinery, and materials of a corporation does not

give the purchaser the right to use as its name the name of such corporation."

Further:

"As against a corporation entitled to its name of the 'Armington & Sims Engine Company,' and which has rightfully manufactured the Armington & Sims engines, a corporation subsequently engaging in the manufacture of such engines, and having the right to manufacture them, the patents on them having expired, and, by reason of the right to manufacture, having the right to describe them as the Armington & Sims engines, has not the right to use the corporate name 'Armington & Sims Company,' and hold itself out as the successor of the 'Armington & Sims Engine Company', which is still in existence, though there is no intention to deceive, and the latter corporation is not at the time in business, and there may be no present damages."

At the bottom of the last column on page 311, the court said:

"The third branch of the defense, the claim of authority, cannot prevail. The respondents did not acquire the right to use the name by purchase. They bought only the plant, machinery, stock, and such visible property. *The purchase of these does not carry the franchise or name of the corporation.* Undoubtedly, as the respondents claim, the right to use the name goes with the right to manufacture; but this applies only to the use of the name in connection with the article, while the question here involved is the right to use the name of a maker, which stands upon a different ground."

Here, Thomas Day Company is still in existence, and it will after these proceedings are terminated have the right to conduct such business as it may elect. True, all of its physical properties and patents, if any it has, have gone to the purchaser by virtue of a receiver's sale, but such sale has not taken from it the name "Thomas Day Company" or the franchise granted such corporation by the state to carry on in that name, and we respectfully submit that to allow the purchaser to hold itself out as "the successor of Thomas Day Company", would be to permit it to represent to the public that it is in truth and in fact the successor of the corporate entity of Thomas Day Company and of such name. We reiterate again that it would be giving to the purchaser the right to do indirectly that which it could not do directly. It would be practically the same situation as if a judgment creditor attempted to levy upon property on which the judgment debtor had declared a homestead and the court saying to such judgment creditor, "You cannot have the legal title to such property by reason of a declaration of homestead, and I have no jurisdiction or power to allow you to acquire such title, but, I will issue a permanent injunction against the judgment debtor requiring him to allow you to occupy and enjoy forever the possession of the property in question and restrain him, the judgment debtor, from ever making any claim to such property, or the possession thereof." Such, of course, in the absence of considerations not involved herein, could not be done.

CONCLUSION.

Accordingly, we respectfully submit that while in a proceeding such as the present the receiver had the authority to sell the good-will and physical assets of Thomas Day Company, still such receiver had no authority to purport to transfer to the purchaser the right to hold itself out as the "successor of Thomas Day Company" so long as such company was, and is, a corporate entity, and so long as neither the name nor the franchise of such company was subject to sale by judicial proceedings; the phrase "successor of Thomas Day Company" means but one thing, legally or in the mind of the public generally, namely, that such purchaser is the successor not only of the business and good-will of such company but of the name, corporate franchise, and its entire corporate structure as well.

Respectfully submitted,

THOMAS, BEEDY, PRESLEY & PARAMORE,
Attorneys for Thomas Day Company.

STERLING CARR,
Attorney for Whitman Symmes.